UNITED STATES OF AMERICA
THE NATIONAL LABOR RELATIONS BOARD
WASHINGTON, D.C.

LABORERS' INTERNATIONAL UNION OF
NORTH AMERICA, LOCAL 310

Charged Party; and

KMU TRUCKING & EXCAVATING	Case No. 08-CD-109665
SCHIRMER CONSTRUCTION CO.	Case No. 08-CD-109666
PLATFORM CEMENT	Case No. 08-CD-109671
21ST CENTURY CONCRETE CONSTRUCTION, INC.	Case No. 08-CD-109683
INDEPENDENCE EXCAVATING, INC.	Case No. 08-CD-109709
DONLEY'S, INC.	Case No. 08-CD-114937

Charging Parties; and

INTERNATIONAL UNION OF OPERATING ENGINEERS,
LOCAL 18

Party-in-Interest

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 18'S MOTION FOR RECONSIDERATION

Pursuant to Section 102.48(d)(1) of the Board's Rules and Regulations, now comes the International Union of Operating Engineers, Local 18, by and through counsel, and for the reasons which follow, respectfully Moves for Reconsideration of the Board's Decision and Determination in the instant matter. A Brief in Support of this Motion is attached hereto and incorporated herein by reference.

Respectfully Submitted,

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BRIEF IN SUPPORT

I. Introduction

From January 13 to 14, 2014, the International Union of Operating Engineers, Local 18 ("Local 18" or "Union") was a party to a hearing under Section 10(k) of the National Labor Relations Act ("Act") regarding the above-captioned matter. On September 3, 2014, the Board rendered its Decision and Determination of Dispute. *Laborers' International Union of North America, Local 310 (KMU Trucking & Excavating)*, 361 NLRB No. 37 (2014). The Board rejected Local 18's contention that the present matter is a work preservation dispute outside the scope of Section 10(k), and ultimately found that there was reasonable cause to believe that Section 8(b)(4)(D) of the Act was violated. Accordingly, the Board rendered a decision on the merits, and awarded the work to the Laborers' International Union of North America, Local 310 ("LIUNA 310").

The Board's decision in this case is simply a result in a search of a reason. The original assignment of the Board under Section 10(k) was to effectively serve as an impartial arbitrator in jurisdictional disputes, *see NLRB v. Radio & Television Broadcast Engineers Union Local 212 (Columbia Broadcasting System)*, 364 U.S. 573, 581-582, 81 S.Ct. 330, 5 L.Ed.2d 302 (1961), yet through Board custom and practice, Section 10(k) proceedings have become nothing more than factual free-for-alls. Indeed, the non-adversarial nature of a Section 10(k) hearing results in a bureaucratic boondoggle in which no equitable consideration for the basic principles of due process and evidentiary restraint is made. The Board becomes a modern-day star chamber, free to shape the unconstrained facts into an arbitrary decision of its choosing.

Under this cloud of questionable adjudication, the Board blindly applied its scope of award in *Operating Engineers Local 18 (Donley's, Inc.)*, 360 NLRB No. 113 (2014) ("*Donley's II*") to the present case, finding, in utter contrast to decades of Board precedent, that there should

be an area-wide award; *to wit*, where the Employers operate and the unions' jurisdictions overlap. However, in order to grant an area-wide award, the proclivity to engage in future unlawful action with the objecting of obtaining work similar to that in dispute must be performed by the *charged party*. Because Local 18 is not the charged party in the present case, the Board materially erred by simply restating its scope of award determination in *Donley's II*. The Board should properly re-determine the scope of its award in the present matter, consistent with precedent.

II. Law & Analysis

In the context of Section 10(k) proceedings, the Board will permit a party to file a motion for reconsideration after it has rendered its decision and determination of dispute. *See, e.g., Machinists Lodge 160 (SSA Marine)*, 360 NLRB No. 64, *6 (2014). The Board committed material error in the present matter by rendering an area-wide award because Local 18 is not a charged party, merely a party-in-interest. In order to issue an area-wide award, there must be a finding that the charged union demonstrates a proclivity to "engage in unlawful conduct in order to obtain work similar to the work in dispute." *E.g., Laborers' District Council of Chicago (Paul H. Schwendener, Inc.)*, 304 NLRB 623, 625 (1991), fn. 10. Under Board precedent, in order for proclivity by the charged party to be established, the offending conduct must extend beyond the employers in the action to other non-party contractors and into neutral settings unrelated to the work in dispute. *E.g., Sheet Metal Workers, Local 19 (E.P. Donnelly)*, 345 NLRB 960, 965 (2005). *Accord Electrical Workers IBEW Local 103 (Lucent Technologies)*, 333 NLRB 828, 831–832 (2001).

In *Donley's III*, the Board merely restated and reapplied its area-wide award in *Donley's II*. However, in the former case, unlike the latter, Local 18 is *not* a charged party. Therefore, under established precedent, the record must demonstrate that LIUNA 310 manifested a

tendency to "engage in unlawful conduct" which extends past the charging party employers in the instant case to other non-party employers and other non-disputed work settings. *See, e.g., Laborers' District Council of Chicago (Paul H. Schwendener, Inc.)*, 304 NLRB at 625; *Sheet Metal Workers, Local 19 (E.P. Donnelly)*, 345 NLRB at 965; *Electrical Workers IBEW Local 103 (Lucent Technologies)*, 333 NLRB at 831–832. The record does not permit such a finding in any way, shape, or form. That is, there is no evidence – nor has the Board found any – that LIUNA 310 has shown a proclivity to engage in unlawful conduct with non-party contractors in order to obtain work similar to that in dispute. Without this critical element present, the Board's rehashing of its *Donley's II* scope of award is materially erroneous as it is starkly at odds with decades of traditional Board law. Moreover, it is almost a matter of course that the Board will *decline* to grant an area-wide award in cases where the charged union "represents the employees to whom the work is awarded and to whom the Employer contemplates continuing to assign the work." *E.g., Electrical Workers (Asplundh Constr. Corp.)*, 331 NLRB 779, 781 (2000). *Accord Machinists District Lodge No. 160 (Sea-Land Service, Inc.)*, 322 NLRB 830, 835 (1997); *Laborers' District Council of Chicago (Paul H. Schwendener, Inc.)*, 304 NLRB at 625. Because LIUNA 310 was the charged union, to whom the employees it represents were awarded the work by the Board, and the record amply demonstrates that the charging party employers plan to continue assigning the work to such employees, the Board's award should have been confined to the jobsites where the work in dispute took place.

Effectively, the Board has decided this case "on its own merits without announcing any standards or principles which govern the decision[] . . . made." *NLRB v. Internal. Longshoremen's & Warehousemen's Union*, 504 F.2d 1209, 1220 (9th Cir. 1974). This practice "has relieved the Board of the burden of reconciling its decisions either with precedent or with any predetermined set of standards." *Id.* This behavior leads to "totally unprincipled" decisions

that strip parties' ability to understand why, or why not, the Board has come to a particular finding. *Id*. Unless the Board deigns to provide a reasoned justification, consistent with precedent, that explains its mystifying issuance of an area-wide award in the present case, such an award is material error, completely at odds with its own body of law. Under such circumstances, the Board will readily grant a motion for reconsideration where it has "made a material error with respect to the appropriate remedy[.]" *Detroit Newspaper Agency*, 343 NLRB 1041, 1041 (2004). As such, the Board should render a supplemental decision that reflects correct and prevailing precedent in terms of the proper scope of award, in that it is limited to the jobsites in dispute.

III. Conclusion

For all the forgoing reasons, Local 18 hereby requests that the Board grant its Motion for Reconsideration.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing was electronically filed with National Labor Relations Board and served *via* email to the following on this 29th day of September 2014:

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